In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-495

ARCHIE JAMES SHUMAR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-5482

CLAUDE W. CLARKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were denied effective assistance of counsel. Petitioner Shumar also contends that the evidence was insufficient to sustain his conviction and that the court erroneously permitted the introduction of certain gambling paraphernalia into evidence against him. Petitioner Clarke contends in addition that 18 U.S.C. 1955 is unconstitutional.

On April 25, 1972, petitioners were indicted with 28 other persons in a three-count indictment in the United States District Court for the Southern District of Indiana. Count 1 charged a conspiracy to violate 18 U.S.C. 1955 by conducting a gambling business involving five or more persons in violation of Indiana law; counts 2 and 3 charged substantive offenses in violation of the same statute. Five defendants, including petitioners, were ultimately tried.[1] Petitioners were convicted on all three counts.[2] Petitioner Clarke was sentenced to a term of three years' imprisonment on count 1, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2); sentences on counts 2 and 3 were suspended and Clarke was placed on probation for five years to begin at the conclusion of the sentence imposed on count 1. Petitioner Shumar was sentenced to a term of one year's imprisonment on count 1; sentences on counts 2 and 3 were suspended and Shumar was placed on probation for five years to begin at the conclusion of the sentence imposed on count 1.

The court of appeals affirmed both petitioners' convictions on counts 2 and 3 but reversed petitioners' convictions on count 1 (Shumar Pet. App. A1-A12), relying upon its decision in *United States* v. *Hunter*, 478 F. 2d 1019. The court had held in *Hunter* that Wharton's Rule precludes an indictment for conspiracy to violate 18 U.S.C. 1955.[3]

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[1]The indictment was dismissed with respect to four of the defendants; one defendant pleaded *nolo contendere* to count 1; and 20 defendants pleaded guilty (thirteen to count 1, two to count 2, and five to count 3).

[2]Co-defendants Brady and Baird were convicted on counts 2 and 3 and co-defendant Tomlinson on counts 1, 2 and 3.

[3]The Wharton's Rule issue is pending before this Court in *Iannelli* v. *United States*, No. 73-64. The court of appeals has extended the government's time for filing a petition for rehearing in the present case until 14 days after this Court's decision in *Iannelli*.

The evidence presented at trial showed that petitioner Clarke was manager and partner with co-defendant Brown in a large, illegal bookmaking operation in Indianapolis (Tr. 140, 157). Brown and Clarke also operated a casino in Indianapolis in which poker games were conducted (Tr. 4-8, 113, 192, 471-485, 517). Petitioner Shumar, also known as "Arch" and "7", placed many lay-off bets[4] with the operation (Tr. 10-11, 16-17, 74, 328-330, 342-343, 349, 375, 478, 490, 516, 619), splitting his weekly profits or losses with Brown and Clarke on a 50-50 basis (Tr. 17-19, 21, 25, 128-129, 157, 165, 330-331, 651). The Brown-Clarke operation delivered four racing forms and six green sheets (the Illinois Sporting News) to petitioner Shumar daily, and picked up or delivered gambling payments (Tr. 43-44, 471-474, 484-485, 497, 502-503, 506-509). Bets were placed by telephone (Tr. 71-95, 332 *et seq.*).

At 3:00 p.m. on April 21, 1972, F.B.I. agents, acting pursuant to search and arrest warrants, searched the apartment in which the bookmaking operation was conducted (Tr. 191-192, 252, 276). Clarke and co-defendant Sights, who were in the apartment at the time of the raid, were arrested (Tr. 192-193, 213, 258, 276-277, 287, 289). Gambling paraphernalia was seized by the agents (Tr. 195-213, 259-266, 278-288). While they were in the apartment, the agents answered the telephones; callers asked for Claude or Joe and attempted to place bets or obtain horse betting information (Tr. 270).

Meanwhile, agents searched petitioner Shumar's apartment (Tr. 234-235) and placed Shumar under arrest (Tr. 234-236, 246, 249). The agents answered Shumar's telephones for about an hour or an hour and a half (Tr. 241-

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[4]A lay-off bet is placed by one bookmaker with another to prevent large gambling losses.

242); all the telephone calls he received concerned horse-racing bets, and many of the callers asked for "Arch" (Tr. 242-246). Moreover, a court-ordered wiretap placed on the Brown-Clarke telephones between March 17, 1972, and April 14, 1972, revealed 86 calls to Shumar's telephones (Tr. 309; see also Tr. 417-426, 648-650). Evidence obtained through the court-ordered wiretaps showed that the telephones at both locations had been used by petitioners, among others, to book horse-racing and sports bets (Tr. 215-221, 295-311, 349-362, 373-392, 397-402, 416-426, 458-469).

A simultaneous search of the casino run by Brown and Clarke resulted in the seizure of gambling paraphernalia including racing forms, green sheets, and poker chips, as well as cash (Tr. 534-544).

Petitioner Clarke testified at trial on his own behalf (Tr. 598 *et seq.*). He admitted conducting the gambling operation with Brown (Tr. 615-621). His defense was that he thought that if he bought a yearly Federal Wagering Tax Stamp, confined his activities to the State of Indiana, and prevented state and local authorities from discovering his gambling activities, he would not be in violation of any federal laws (Tr. 621-622). Petitioner Shumar did not testify and presented no evidence.

1. Both petitioners contend that they were denied effective assistance of counsel because they were represented by counsel who also represented other co-defendants. This contention was correctly rejected by the court of appeals, on whose opinion we rely (Shumar Pet. App. A3-A7). Petitioners had ample prior notice that a conflict might arise at the trial, and they waived their right to seek other counsel in open court (Tr. 935-962). As the court of appeals stated (Shumar Pet. App. A6), "the

failure of a defendant to retain new counsel after being informed of possible conflicts of interest with his present counsel and the probability of resulting prejudice constitutes a waiver of any subsequent claims based on the possibility of conflict." In any event, the fact that a single counsel represents several defendants is not tantamount to the denial of effective assistance of counsel. See *United States* v. *Lovano*, 420 F. 2d 769, 772-774 (C.A. 2), certiorari denied, 397 U.S. 1071; *United States* v. *Frame*, 454 F. 2d 1136, 1138 (C.A. 9).

Moreover, "the burden of proof is on a defendant to establish by clear and convincing evidence that a conflict of interest existed." *Curry* v. *Burke*, 404 F. 2d 65, 67 (C.A. 7). Petitioners have failed to establish such a conflict of interest. Petitioner Clarke's broad contention that the "complexity" of the statute and the "varying complicity of the defendants" created an "inevitable" conflict of interest (Pet. 4) would apply to virtually any prosecution brought under 18 U.S.C. 1955, which applies to gambling businesses involving several persons. Petitioner Shumar's contention (Pet. 13) that his counsel was unable to distinguish his role as "customer" from that of his co-defendants as "employees" is without basis; there is no reason to suppose this distinction was lost upon counsel. The added fact that petitioners failed to retain new counsel after being informed of the possibility of a conflict of interest in their single retained counsel further discredits their contention that such a conflict existed and gives credence to the court's surmise that the conflict of interest claim amounted to nothing more than a "trial tactic" (Shumar Pet. App. A7).

2. Petitioner Shumar contends that the evidence was insufficient to sustain his conviction for violations of 18 U.S.C. 1955. As the court of appeals stated, however (Shumar Pet. App. A9-A10):

> [T]he record shows Shumar placed lay-off bets over the telephones of the gambling operation * * *; that he was known to the operation as Arch and had place "7" on the wooden rack at the gambling headquarters that listed key accounts. Certain services were furnished these accounts such as scratch information, race results, sports line information, green sheets and racing forms that would attract lay-off bets to the headquarters. The route man who serviced Shumar testified that the latter was his second largest customer for green sheets and racing forms. Shumar received each day 4 copies of the Daily Racing Form, six copies of the Illinois Sporting News (green sheet) and was allowed a 50 percent discount from his gambling operations.

Considered in the light most favorable to the government, this evidence was sufficient to sustain the conviction. See *United States* v. *Bobo*, 477 F. 2d 974 (C.A. 4).

3. Petitioner Shumar contends that the court erroneously admitted certain gambling paraphernalia into evidence against him, since there was no allegation that he participated in their use. As the court of appeals correctly stated, however, "even where a conspiracy is not charged, conspiracy rules of evidence and accountability can be applied to a criminal scheme" (Shumar Pet. App. A10). See *United States* v. *Joyce*, 499 F. 2d 9, 16 (C.A. 7), certiorari denied, November 25, 1974 (No. 73-1947). Moreover, all the items to which Shumar objects save one—the poker chips seized from the veterans club—were

related to the gambling operation in which petitioner was intimately involved. Thus, as the court of appeals held (Shumar Pet. App. A10-A11), any error in the admission of the poker chips was harmless.

4. Petitioner Clarke's contention that 18 U.S.C. 1955 is unconstitutional has been consistently rejected by the courts of appeals. See, *e.g.*, *United States* v. *Sacco*, 491 F. 2d 995, 1001-1003 (C.A. 9); *United States* v. *Dimario*, 473 F. 2d 1046, 1047 (C.A. 6), certiorari denied, 412 U.S. 907; *Schneider* v. *United States*, 459 F. 2d 540, 542-543 (C.A. 8), certiorari denied, 409 U.S. 877. As the Eighth Circuit stated in *Schneider*, *supra*, the statute is a "constitutional exercise of power under the commerce clause" (459 F. 2d at 542), notwithstanding that offenses under the statute are based on state law and that the nationwide effect is not uniform.

In enacting 18 U.S.C. 1955, Congress reasonably found that illegal gambling affects interstate commerce (see 84 Stat. 936). Gambling, like loan sharking, " * * * is one way organized interstate crime * * * syphons funds from numerous localities to finance its national operations." *Perez* v. *United States*, 402 U.S. 146, 157. The means chosen to control this evil are reasonable. *White* v. *United States*, 399 F. 2d 813 (C.A. 8).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.